In the

United States Court of Appeals

For the Ninth Circuit

No. 13245

WESTERN AIR LINES, INC., *Petitioner*, vs. CIVIL AERONAUTICS BOARD, *Respondent.*	

REPLY BRIEF OF UNITED AIR LINES, INC., AS AMICUS CURIAE.

Reginald S. Laughlin,
John T. Lorch,
Floyd M. Rett,
Henry L. Hill,
Attorneys for United Air Lines, Inc.

Treadwell & Laughlin,
220 Montgomery Street,
San Francisco 4, California,
and
Mayer, Meyer, Austrian & Platt,
231 South La Salle Street,
Chicago 4, Illinois,
Of Counsel.

Dated: April 17, 1952.

FILED
APR 17 1952
PAUL P. O'BRIEN
CLE

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

List of Authorities Cited ii

I. Introductory 1

II. Reply to the Argument That the Board Has Unlimited Power to Suspend a Certificate of Public Convenience and Necessity 3

III. Reply to the Board's Argument That It Has Not Effected a Revocation of Western's Certificate.. 7

IV. Reply to the Argument That the Board's Action Meets the Standard of Public Convenience and Necessity 13

V. Reply to the Argument That Western's Interpretation of the Board's Suspension Power Is Too Narrow 16

Conclusion 18

LIST OF AUTHORITIES CITED.

Cases.

Arizona-New Mexico Case, 9 C. A. B. 85, 94 (1948) 14

Braniff Air, Houston-Memphis-Louisville Route, 2 C. A. B. 353, 380 (1940) 14

Caribbean Area Case, 9 C. A. B. 534 (1948) 17, 18

Continental A. L., et al., Texas Air Service, 4 C. A. B. 215, 233 (1934) 14

Interstate Commerce Commission v. Illinois Central R. R., 215 U. S. 452, 470, 30 Sup. Ct. 155, 160 (1910) 4

Interstate Commerce Commission v. Railway Company, 167 U. S. 479, 17 Sup. Ct. 896, 904 (1897) 16

New England Divisions Case, 261 U. S. 184, 189, 43 Sup. Ct. 270, 273 (1923) 4

Pan American-Grace Airways v. Civil Aeronautics Board, 178 F. 2d 34 (C. A., D. C., 1948) 16

Southwest Renewal-United Suspension Case, Docket No. 3718, et al., ... C. A. B. .... (1952) 2

Texts and Articles.

Nyrop, The Civil Aeronautics Board and Local Air Service, Address before the Local Service Airline Seminar, Purdue University, Lafayette, Indiana, June 22, 1951 12

Ryan, The Revocation of an Airline Certificate of Public Convenience and Necessity, 15 Journal of Air Law and Commerce 377, at 385 (1948) 5

2 Vom Baur, Federal Administrative Law, Section 566 (1942) 4

Webster's New International Dictionary, Second Edition, 1946 8

3 Words and Phrases 283, 316 (Perm. Edition) 9

Statutes.

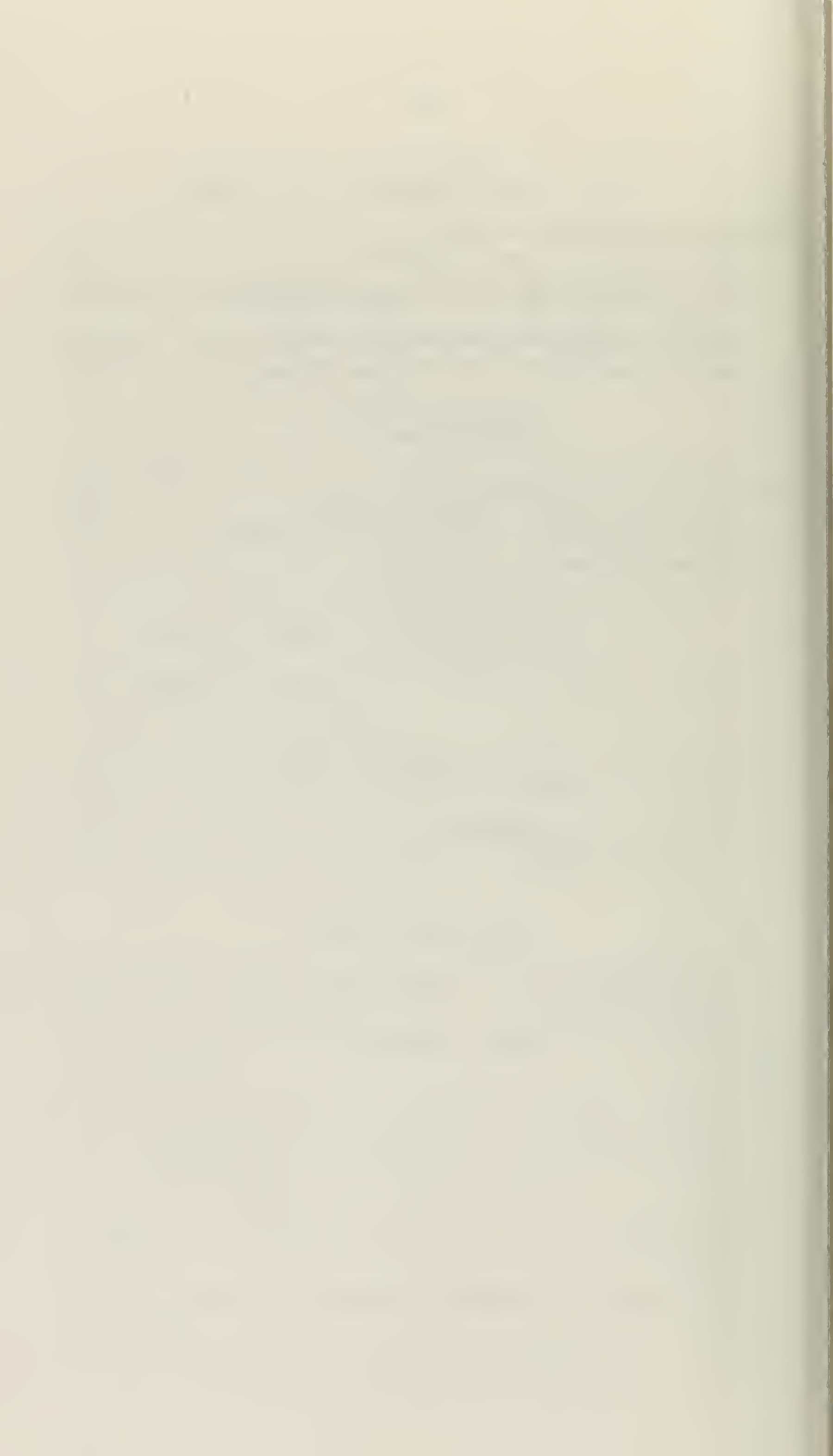
Civil Aeronautics Act of 1938
Section 401(g), 49 U. S. C., Sec. 481(g) 10
Section 401(h), 49 U. S. C., Sec. 481(h) 7
Section 402(g), 49 U. S. C., Sec. 482(g) 9
Section 404(a), 49 U. S. C., Sec. 484(a) 15

Miscellaneous.

Civil Aeronautics Board Orders
Serial No. E-6211, March 13, 1952* 12

---

* Not officially reported.



In the

United States Court of Appeals

For the Ninth Circuit

No. 13245

WESTERN AIR LINES, INC., *Petitioner*, vs. CIVIL AERONAUTICS BOARD, *Respondent.*	

REPLY BRIEF OF UNITED AIR LINES, INC., AS AMICUS CURIAE.

I.

Introductory.

In its original brief filed in this proceeding as *amicus curiae,* United Air Lines, Inc., demonstrated that the Civil Aeronautics Act of 1938, as amended, does not confer upon the Civil Aeronautics Board, either expressly or by implication, the authority to suspend Western's permanent certificate of public convenience and necessity for the purpose of realigning the domestic air transportation pattern. Further, United demonstrated that the Board does not possess the power to indefinitely or permanently "suspend" Western's permanent certificate of public convenience and necessity. Finally, United established that the Board lacks authority to substitute the services

of a temporarily certificated carrier for those of a permanently certificated carrier.

The Board does not deny that its suspension of Western is part of a broad route realignment program. In fact, in its "Counter Statement of the Case" (Resp. Brief, pp. 2-8), the Board has admitted that the suspension of Western and substitution of Bonanza was based upon an established policy of favoring the award of local air service routes to local air service operators rather than trunkline air carriers (p. 6). In the *Southwest Renewal-United Suspension Case,* Docket No. 3718, *et al.,* decided on January 29, 1952, and quoted in United's brief at page nine, the Board admitted that it is engaged in such a program of route realignment. As has also been pointed out (United's brief, p. 9), the instant proceeding is merely one of more than 15 similar proceedings involving suspension of points or routes served by various carriers, all directed to a revision of the air route pattern. It must be considered as an established fact, therefore, that the suspension of Western in this proceeding is an attempt by the Board to further its realignment of the air route pattern.

Nor has the Board made any attempt to answer the argument advanced in United's brief, and also in Petitioner's, that the suspension power of Section 401(h) does not permit the realignment of the route structure as is now being attempted by the Board. That there is no valid answer to this argument has been best demonstrated by the Board's silence. In seeking to suspend Western's authority in order to accomplish such a purpose, the Board has clearly exceeded its powers.

Respondent, Civil Aeronautics Board, has taken the extreme position in its brief that it possesses what amounts to unlimited power to suspend a carrier's certificate and that its suspension of Western did not constitute a revoca-

tion of Western's operating authority even though it might be construed as an indefinite suspension. These positions are contrary to the very meaning of the express statutory language and contrary to the legislative history of the Civil Aeronautics Act. They cannot be sustained.

II.

Reply to the Argument That the Board Has Unlimited Power to Suspend a Certificate of Public Convenience and Necessity.

Stripped to its essentials, it is the position of the Civil Aeronautics Board that it has an unlimited power of suspension as long as its action is predicated upon findings of public convenience and necessity. The Board's basic position appears on page 17 of its brief, wherein it states that the statute permits the Board to suspend where the public convenience and necessity so require, and this is the *only* test. This argument oversimplifies the problem of statutory construction, which confronts this court. The power to suspend contained in Section 401(h) is not unlimited.

The standard of public convenience and necessity does not, as the Board contends, represent the only true test of the Board's power. Public convenience and necessity is the standard pursuant to which the Board's power is to be exercised once the scope of the power has been otherwise determined. A discussion of the Board's findings with respect to public convenience and necessity, therefore, leaves the question of the Board's power in this case unanswered.

Whether or not the suspension in this case is within the Board's power depends upon the purpose sought to

be accomplished. It is basic to any determination of statutory power that the exercise of that power must be examined in the light of the objects to which it is being directed. *Interstate Commerce Commission* v. *Illinois Central R. R.,* 215 U. S. 452, 470, 30 Sup. Ct. 155, 160 (1910). As stated by Vom Baur in his treatise on administrative law:

> "* * * Words must be honestly and accurately used. If a standard term such as 'unreasonable,' 'unjustly discriminatory,' 'public interest,' 'public convenience and necessity,' 'protection of investors,' etc., could be given effect as a mere combination of letters without inquiring as to its true meaning and the applicability of that meaning to a particular factual situation, there would be no bounds to the assumption of power by administrative agencies. Constitutional limitations would in their turn become empty phrases. It would be impossible to prevent agencies from exercising power not conferred in order to effectuate personal whims, ulterior motives, or other extralegal considerations, under the guise of exercising lawful powers. Under our constitutional system this may not be done". 2 Vom Baur, *Federal Administrative Law,* Section 566 (1942).

The Supreme Court in the *New England Divisions Case,* 261 U. S. 184, 189, 43 Sup. Ct. 270, 273 (1923), succinctly stated the proposition as follows:

> "An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized."

The Board's object in this proceeding is evident. It is seeking to employ the suspension power for the purpose of forcibly remaking the nation's air route structure pursuant to new policies evolved by the Board itself. Congress did not intend such result in the Civil Aeronautics Act. It was not intended that the Board should be able to sus-

pend a carrier's certificate, in whole or in part, either temporarily or indefinitely, whenever the Board changed its mind. The legislative history is clearly opposed to such "flexibility" in the route structure. Vice Chairman Ryan of the Board has stated this clearly:

> "* * * In view of the protection afforded by the certificate, which for almost ten years has been the foundation of the stability of the private investments dedicated to the public service of air transportation, it is not surprising that Congress should impart to a certificate a certain stability by providing that it should be subject to revocation only for statutory cause *and not pursuant to a mere change of mind on the part of the Board.*" (Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity,* 15 Journal of Air Law and Commerce 377, at 385 (1948); italics added.)

The meaning of the word "suspend" itself, as well as the purpose and intent of the Act, and the congressional history surrounding this legislation demonstrate that the Board's suspension power is not unlimited. Thus, as shown in the brief of Petitioner and in the brief of United Air Lines, Inc., the power to suspend a carrier's permanent certificate of public convenience and necessity for the purpose of realigning the air route structure is inimical to the purpose of the Act and to the congressional intent. Such power, if construed to exist within the meaning of the word "suspend", would destroy the very stability of certificates of public convenience and necessity and the route stability which it was the intention of Congress to create under the Civil Aeronautics Act. It would constitute a power unprecedented in Federal legislation.

The Board's brief denies generally that its action in this case is inconsistent with the purposes of the Civil Aeronautics Act. However, nowhere does the Board cite any language of the Act or any legislative history which

supports the proposition, even remotely, that the Board possesses the power to suspend certificates of public convenience and necessity for the purpose of realigning the domestic route pattern. On the contrary, the legislative history which has been cited at length in the briefs of Petitioner and of United forcefully shows the dominant purpose to be security of certificate and of route. Such history does not support the conclusion advanced by the Board that the Act was primarily designed to establish a concept of regulated competition. The regulation of competition was ancillary to route and certificate security. Nor is it a "corollary" to the "protection" to be afforded a certificate of public convenience and necessity that the Board have, as it alleges (Resp. Brief, p. 32), the power to alter, amend, modify or suspend where the public convenience and necessity so require regardless of the purpose to be accomplished thereby. It is strange "protection" from competition indeed to eliminate Western's services and substitute those of another carrier. Such power is wholly inconsistent with the concept of a permanent certificate of public convenience and necessity which it was the desire of the framers of the Act to create. Such power does not contribute to a sound air transport system. The fact that the air transport industry has grown in strength and stability since the passage of the Civil Aeronautics Act of 1938, despite the existence of the words "alter, amend, modify or suspend" in Section 401(h), is simply because the Board has not, until recently, attempted to construe these words as conferring the power to realign the air route pattern, to substitute the services of one carrier for those of another, or to suspend a carrier's authority indefinitely. The air transport industry has grown in economic stature because up to now it has been assumed that the Civil Aeronautics Act provided for permanent certificates and route stability.

III.

Reply to the Board's Argument That It Has Not Effected a Revocation of Western's Certificate.

The Board argues (Resp. Brief, pp. 18-22) that its suspension of Western's authority to serve Yuma and El Centro is not, in fact, a revocation of Western's certificate authority. This argument is based on the contention that the Board's action is only temporary and, even assuming that its action constitutes an indefinite suspension, such indefinite suspension is not tantamount to a revocation.

To demonstrate that its suspension of Western's authority to serve El Centro and Yuma is purely temporary and is not, in fact, a revocation of Western's authority, the Board argues that the words "alter", "amend" and "modify", contained in Section 401(h), confer the power to permanently eliminate points served by a carrier and, since the Board acted only under the suspension power rather than under the power to alter, amend or modify, it could not possibly have revoked Western's authority. Such reasoning assumes the very question in issue. The fact still remains that the Board's order, though based upon the suspension power of Section 401(h), is tantamount to a revocation of Western's operating authority.

Basic to the Board's argument is the assumption that the words "alter", "amend" and "modify" confer the power to permanently eliminate or revoke a carrier's operating authority.* It is the Board's position that Section 401(h) contains two powers of revocation, one based on the standard of public convenience and necessity and contained in

*Section 401(h), quoted in full at page 10 of United's original brief, provides, in part, as follows:

> "The Board * * * may alter, amend, modify or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, * * *."

the words "alter", "amend" and "modify", and the other based upon the wilful failure to observe the requirements of the Act or of the Board's orders or regulations.

Whatever the words "alter", "amend" or "modify" might mean, the Board, in suspending Western's certificate, did not act upon the basis of such authority, and Respondent's discussion of this language simply interjects matters which have no real bearing on issues before this Court. However, Respondent's argument, even on this basis, must fail. The proposition that Congress carefully spelled out the procedures and standards to be followed by the Board in revoking a carrier's authority and then in another part of the same section conferred the power to revoke pursuant to a different standard and different procedures without even mentioning the word "revoke" is completely untenable. The word "revoke" does not appear in the series "alter, amend, modify or suspend" which have as their standard the public convenience and necessity. Nor can it properly be read into such phrase. The very meaning of the words "alter", "amend" and "modify" precludes any conclusion that these words convey the power to permanently eliminate or revoke a carrier's operating authority as asserted by the Board. The ordinary meaning given to the word "alter" is, "To change in one or more respects, but not entirely; to make (a thing) different without changing it into something else; to vary; to modify; * * *." The word "amend" is defined as, " To reform, convert, or make better, * * *; To change or modify in any way for the better; to improve; to better * * *", while the ordinary meaning given "modify" in the sense used here is "To change somewhat the form or qualities of; to alter somewhat; as, to *modify* the terms of a contract." (Webster's New International Dictionary, Second Edition, 1946.) The courts have had frequent occasion to define these words, and generally it has been held

that the words "alter", "amend" and "modify" refer only to such revision as does not work a fundamental change in the character or nature of the thing being altered, amended or modified. 3 Words and Phrases 283; 316 (Perm. Edition). It would be difficult indeed to deny that the complete elimination or revocation of authority to serve a point is more than an alteration, amendment or modification of that part of a certificate.*

The attempt to read the power of permanent elimination or revocation of a certificate or any part thereof into the words "alter", "amend" or "modify" constitutes nothing more than legislation by an administrative body. It must be assumed that Congress used these words in their ordinary meaning. If the permanent cancellation or termination of a certificate of public convenience and necessity were intended to be permitted on a finding of the public convenience and necessity, it would have been easy and logical for the framers of the Act to include the word "revoke", which so concisely expresses such power, with the words "alter", "amend", "modify" or "suspend". When it so intended, this was done by Congress in Section 402(g) of the Act. In that section, Congress has provided for the cancellation or revocation of foreign air carrier permits upon the basis of the "public interest", which is also the prescribed standard for the alteration, modification, amendment or suspension of such permits. By providing that

> "Any permit issued under the provisions of this section, may, after notice and hearing, be altered, modified, amended, suspended, *cancelled,* or *revoked* by

---

*The Board argues (Resp. Brief, p. 19) that elimination of El Centro and Yuma from Western's certificate is not a basic transformation of that carrier's route as a whole. However, it is more than a complete change in the character—it is an elimination—of that *part* of Western's certificate. Under Section 401(h), the limitations upon the words "alter", "amend" or "modify" extend to any *part* of a certificate as well as to the certificate as a whole.

> the Authority whenever it finds such action to be in the public interest." (49 U. S. C. Sec. 482(g); italics supplied),

it is clear that Congress did not attribute the same meaning to all of these words. The argument that "alter", "amend" or "modify", as used in Section 401(h), mean the same as "revoke", in other words, to permit the permanent elimination of a carrier's operating authority, cannot be reconciled with the separate use of those words in Section 402(g) of the Act.

Section 401(g) also indicates, and perhaps does so more clearly than any other section of the Act, that the power to revoke or permanently cancel any certificate of public convenience and necessity, or any part thereof, is not included within the meaning of the words "alter", "amend" or "modify". This section of the Act provides that, "Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided * * *." This language expressly states that certificates of public convenience and necessity shall be permanent unless terminated according to the named procedures set forth—the suspension and revocation referred to in Section 401(h) of the Act. If the words "alter", "amend" or "modify" had been intended to include the power to revoke a certificate in whole or in part, these words would also have been set forth in Section 401(g) as conditions which might bring about the termination of a certificate.

As demonstrated in the original briefs of Petitioner and of United, the Board's suspension of Western's authority to serve El Centro and Yuma and the substitution therefor of Bonanza is, in fact, a revocation of a part of Western's certificate of public convenience and necessity. The purpose of such "suspension" was to effectuate a new policy favoring the operation of feeder carriers on local

routes, a policy which is coextensive with the existence of feeder carriers. Keeping such policy in mind, the conclusion that Western's "suspension" is indeed revocation is confirmed by the following statement appearing in Respondent's Brief (p. 20):

> "The Board fully recognizes that the temporary certificate of Bonanza may well be renewed. The Board has many times expressed its hope and confidence in the success of the local air service experiment and *it would not likely have provided a service which it thought would so soon come to an end.*" (Italics supplied.)

The Board asserts that the proposition that its action constitutes a revocation is based simply upon speculation. However, in arguing that there may be changes in the future in Bonanza's authority which would mean a return of Western's service, the Board is itself asking the Court to speculate concerning its future actions. In view of the statements of the Board in opinions and orders and the statements of Board members in public speeches, the conclusion that Western's suspension must be considered as permanent is not speculative. The following quotation from the speech of Chairman Donald W. Nyrop, delivered on June 22, 1951, shortly after he was appointed to the Board, eliminates the necessity for speculation on the part of Petitioner or this Court:

> "I believe that the commercial air route pattern of the United States has evolved naturally into a two-level structure; that is, the structure on the one hand of the major trunkline air operations and on the other hand of the local air service serving small cities and towns on comparatively short-haul operations. As we progress farther into the future with air travel becoming more and more necessary and usable, I believe that the judgment of the Civil Aeronautics Board in laying the foundation for this secondary short-haul

air transportation will be more than justified. *The local scheduled air carrier operation has come to stay.*"* (Italics supplied.)

If any doubt still remains, it should be noted that on March 13, 1952, the Board issued its tentative findings and conclusions in the matter of Bonanza's mail compensation and proposed therein that depreciation on certain of that carrier's ground equipment be extended from the current rate of three years to twelve years (Order, Serial No. E-6211).

There is no speculation in Western's viewing the facts as they really are. They cannot be avoided. Rather, it is the Board's position which is speculative in urging the Court to rely upon a remote *possibility* that Western's authority may be restored.

Moreover, even assuming the duration of Western's suspension to be speculative, this very fact militates against the legality of the Board's action. An indefinite suspension, a possibility which the Board is willing to recognize (Resp. Brief, pp. 21-22), is beyond the powers of the Board. To claim the right of indefinite suspension violates the very meaning of the word "suspend." Suspension represents only a *temporary* withdrawal (United Brief, p. 24). An indefinite "suspension" is not a temporary thing but may well be permanent. It is the Board's theory that as long as there is a possibility of reverter, withdrawal of authority is authorized by the Act. But of what value is such possibility if it may be postponed indefinitely? Member Lee of the Board has recognized that an indefinite suspension has the same effect as a revocation (United Brief, p. 27). *The Board cannot stand before this Court and state that Western's authority to serve Yuma and El Centro*

*Nyrop, *The Civil Aeronautics Board and Local Air Service*, Address before the Local Service Airline Seminar, Purdue University, Lafayette, Indiana, June 22, 1951. See also United Brief, pp. 28-29.

will be restored. Nowhere in its brief is there contained any such statement or promise.

Western is not protected by its right to a full administrative hearing and the right of court review before extension of its present suspension can be ordered, as Respondent urges (Resp. Brief, p. 35). Such right is poor solace as far as Western is concerned. Moreover, if such argument is valid, what protection does the carrier have? The next time around it would be the same thing over again. Presumably, the same policy considerations would dictate continuance of the suspension and when Western again sought review, the same argument of right to a hearing and judicial review would be raised for its defense. This Court should not permit the Board to use the availability of judicial review as a tool to make a mockery of the Civil Aeronautics Act.

IV.

Reply to the Argument That the Board's Action Meets the Standard of Public Convenience and Necessity.

Although the Board appears to have gone beyond the issues before this Court in seeking to argue the factual justification for its action, its argument demonstrates that the Board has exceeded its powers in here suspending Western's certificate of public convenience and necessity. As stated in its Brief (Resp. Brief, pp. 27-28), the reasons for the Board's action fall into two main categories, first, the Board's general policy that local air service be operated by local air carriers rather than trunk-line carriers and, second, that Western in the past has failed to render adequate local service to El Centro and Yuma.

The Board's power of suspension based upon the standard of public convenience and necessity is not a device by

which the Board can substitute the services of one carrier for those of another based simply on the theory of establishing a new type of local air carrier. Such power as the Board may have to suspend a carrier's operating authority under Section 401(h) of the Act must be predicated upon the finding that the public convenience and necessity no longer require the air service being provided. The Board does not state that it found that air service is not required to Yuma and El Centro and, therefore, that the suspension of Western is justified. On the contrary, because of a change in its policy—which previously had justified the authorization of Western to serve El Centro and Yuma—it has found that such air service is required but should now be provided by another carrier. *As long as the public convenience and necessity require air transportation between points served by a carrier, its suspension is not authorized under the Act.*

The Board seeks to bring its action within the standard of public convenience and necessity by asserting that it found that El Centro and Yuma require local air service and that such service could be provided better by Bonanza than by Western. The issue of which carrier could best provide the needed service concerns the selection of carrier rather than whether the public convenience and necessity require the service involved. In its route proceedings, the Board has consistently, since its inception, treated the issues of public convenience and necessity and selection of a carrier separately. *Braniff Air, Houston-Memphis-Louisville Route,* 2 C. A. B. 353, 380 (1940); *Continental A. L. et al., Texas Air Service,* 4 C. A. B. 215, 233 (1943); *Arizona-New Mexico Case,* 9 C. A. B. 85, 94 (1948).

The Board is not without power in the premises. The suspension of Western and substitution of Bonanza was not the only course available to the Board to provide local

air service to El Centro and Yuma. If Western's service in the past was indeed inadequate, as the Board claims, it could have required Western to provide adequate local service under the terms of Section 404(a) of the Act.* Service by trunkline carriers, so called, does not differ so markedly from feeder carrier service, as the Board would have the Court believe, to preclude the application of Section 404. Trunklines do not serve solely terminal-to-terminal traffic on a non-stop basis. In fact, there is no domestic trunkline in existence which does not provide a substantial volume of strictly local traffic.** If, in addition, the Board felt that new local air service is required for Yuma and El Centro, it could have authorized the added competition of Bonanza, assuming that such competition would not have been excessive. However, the Board, by its own action in creating competition, cannot state that such concurrently created competition is a reason for ousting Western.

The Board's explanation of its action (Resp. Brief, pp. 27-28) further reveals that the suspension of Western was largely punitive for failure to render adequate service in the past. As a punitive action, the Board's order is clearly invalid because such action is not only not based

*Section 404(a) of the Civil Aeronautics Act of 1938 reads as follows:

"It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers."

**A comparison of the restrictions upon Bonanza's service set forth on page 25 of Respondent's Brief with those contained in Western's certificate of public convenience and necessity (Appendix to Petitioner's Brief, pp. 67-68) reveals very little real difference. The Board has also permitted feeder carriers to engage in nonstop and skipstop operations.

on public convenience and necessity but fails to meet the requirements of Section 401(h) for the termination of operating authority on such basis.

V.

Reply to the Argument That Western's Interpretation of the Board's Suspension Power Is Too Narrow.

The Board complains that the scope of the suspension power as defined in Western's brief, namely, that suspension may be used to discontinue temporarily a carrier's services when traffic volumes no longer warrant air service,* represents too narrow a limitation upon the Board's suspension power. But, however much the Board may desire broader authority so that it might have unlimited regulatory control over the air transport industry, such broad power cannot simply be read into the Act by implication or as a matter of convenience.

Western's interpretation is consistent with the purpose of the Act as a whole and the legislative history surrounding it. Respondent's Brief notably presents no reference to the express language of the Act or to the legislative history which demonstrates to the contrary. Nor do the cases decided by the Board itself, and which are repeatedly recited in its brief, provide the Court with any precedent. "* * * it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it." *Interstate Commerce Commission* v. *Railway Company,* 167 U. S. 479, 17 Sup. Ct. 896, 904 (1897). Neither does the case of *Pan American-Grace Airways* v. *Civil Aeronautics Board,* 178 F. 2d 34 (C. A., D. C., 1948), cited in Respondent's Brief,

*This is also United's interpretation of the meaning to be given to Section 401(h). See United's Brief, pp. 34-35.

establish the necessity for a broad interpretation of the Board's power to suspend. The court's quoted statement therein (Resp. Brief, p. 30) referring to the Board's suspension power was purely *obiter dictum* and as such has no real validity as precedent. The issue there before the court was whether the Board could properly dismiss a complaint without holding a hearing thereon or submitting the matter to the President. Apart from the fact that the quotation represents only *dictum,* the court's statement does no more than recite the Board's general power of suspension set forth in Section 401(h) of the Act. It does not go into the question of the Board's authority to employ the suspension power to effectuate a realignment of the air transport route pattern, to substitute the services of one carrier for those of another or to suspend a carrier's services for an indefinite period so as to bring about, in fact, a revocation. The suspension proposal involved in that case, which did not even come to trial, was for a definite five-year period and did not involve the substitution of the services of one carrier for those of another.*

In support of its claim to broad and, in effect, unlimited suspension power, the Board refers to the *Caribbean Area Case,* decided by it in 1948, in which the Board pointed to various consequences which might occur in the absence of a broad suspension power.** As stated above at page 16, the Board cannot confer jurisdiction upon itself sim-

*Respondent's Brief construes the single sentence in the court's entire opinion as sanctioning suspension solely for competitive reasons (Resp. Brief, pp. 30-31). However, it should be noted that the court, in a footnote, stated that the facts alleged in behalf of the requested suspension included, "(1) that economic conditions have so changed since the certificate was granted that an additional airline would be inadvisable, since an uncontemplated increased financial burden would fall upon both the Government (through increased mail subsidy payments) and Braniff."

**Because this case has been cited several times in Respondent's Brief, it should be noted also that the Board's action therein did not result in the suspension or elimination of any point contained in Pan American's certificate of public convenience and necessity but only in the amendment of the terms, conditions and limitations applicable to the air service authorized.

ply by the citation of its own opinions. Its assumption of power in the *Caribbean Area Case* was never put to the test of court review. However, apart from this, it should suffice to point out that the problems which the Board there envisioned are not involved in this case. Unlike the possibility contemplated in the *Caribbean* case, there have been no changes in the facts here, thereby effecting the soundness of any prior Board judgment. The change here is simply an attempt to apply a new policy which the Board now seeks to establish favoring feeder carriers over trunkline carriers. Furthermore, unlike the facts confronting the Board in the *Caribbean* case, this case does not represent one in which the stronger carrier is attempting to overpower a weaker carrier. Prior to the Board's opinion and order which is being reviewed, Bonanza did not compete with Western. The Board's discussion in the *Caribbean Area Case* of possible problems which might arise in the absence of an unlimited suspension power should properly have been directed to Congress and are not reasons for the extension of the suspension power conferred in Section 401(h) beyond the purpose intended as revealed by the ordinary meaning to be given to the statutory language and by the legislative history of the Act. Neither are such reasons properly directed to this Court in support of the Board's position. If the Board is to have unlimited power to eliminate a carrier's service based only on what it considers from time to time to be required by a new interpretation of public convenience and necessity, then such power must come, if at all, from the Congress.

Conclusion.

Despite the clear-cut purpose of the Act and despite its legislative history, the Board is claiming in this proceeding a suspension power limited only by what the Board

may construe from time to time as being in the public convenience and necessity. It claims the power to suspend a carrier's permanent certificate for the purpose of realignment of the domestic route structure, to suspend one carrier and substitute therefor the services of another carrier for the implementation of new policies, and to suspend indefinitely the services of a permanently authorized carrier without regard to the express limitations upon the Board's power of revocation. Such broad power over permanent certificates of public convenience and necessity is unprecedented in any Federal legislation and there is nothing in the Civil Aeronautics Act which confers unlimited power of this nature upon the Board, either expressly or by implication: Nor can it be supplied by administrative or judicial legislation. Accordingly, the Board's suspension of Western's services at Yuma and El Centro must be set aside as being beyond the powers conferred upon it by the Civil Aeronautics Act.

Respectfully submitted,

REGINALD S. LAUGHLIN,
JOHN T. LORCH,
FLOYD M. RETT,
HENRY L. HILL,
Attorneys for United Air Lines, Inc.

TREADWELL & LAUGHLIN,
220 Montgomery Street,
San Francisco 4, California
and
MAYER, MEYER, AUSTRIAN & PLATT,
231 South LaSalle Street,
Chicago 4, Illinois,
Of Counsel.

Dated: April 17, 1952.

Certificate of Service.

I hereby certify that I have this day served the foregoing Reply Brief upon Western Air Lines, Inc., the Civil Aeronautics Board, Bonanza Air Lines, Inc., Mid-West Airlines, Inc., and Wisconsin Central Airlines, Inc., by mailing to their respective attornies of record three copies thereof, properly addressed, with postage prepaid.

Dated at Chicago, Illinois, this 17th day of April, 1952.

John T. Lorch,
Attorney for United Air Lines, Inc.